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No. 89-601

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,

*Petitioners,*

—v.—

MARIE LUCIE JEAN, ET AL.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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### STATEMENT

Respondents will not burden the Court with their own detailed statement of the procedural posture of this case. Respondents merely wish to emphasize certain facts that are not apparent from the government's Statement.

1. The government omits from its Statement the fact that the litigation over fees in this case has now lasted seven years—longer than the litigation on the merits, which itself was

described by the Eleventh Circuit as "long, complex and bitterly contested. . . ." (Pet. App. at 1a).*

2. The government incorrectly argues here that it "prevailed on all the issues that were fully litigated in this case." (Pet. at 11 n.10). The district court unequivocally found that:

> Plaintiffs clearly accomplished the primary goals of the lawsuit, which were to stop the mass exclusion hearings being held without counsel, to enforce the rule of law through the Administrative Procedure Act, to establish that race and national origin were impermissible factors in the enforcement of facially neutral statutes, and to obtain the class members' release from detention.

(Pet. App. at 67a, *see also id.* at 89a-92a). The Eleventh Circuit agreed that plaintiffs prevailed, as well as with the district court's detailed conclusion that plaintiffs effectively received the relief sought in each count of the complaint. (Pet. App. at 48a-49a, 90a-91a, 8a-11a, 23a).

3. Similarly, despite the unanimous view of the courts below to the contrary (Pet. App. at 13a-17a, 53a, 56a, 92a-95a), the government continues to argue that its position was "substantially justified." As the Eleventh Circuit found, the government's position was unreasonable both legally and factually. Among other things, the government ignored the advice of its own counsel that its actions were unlawful and denied crucial facts until "well into the litigation [when] the defendants admitted what had been obvious. . . ." (Pet. App. at 15a-17a.)

4. The Petition altogether omits the critical fact that the government has waived the issue it would now have this Court

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* The entire litigation reflects the government's propensity to protract the case unreasonably. As the district court observed:

> The government took an unusually unwaivering and litigious position throughout the litigation. Many of the government's contentions and litigating postures were unwarranted and unnecessarily prolonged the litigation. The government used all of its considerable resources in opposing Plaintiffs' contentions at every turn.

(Pet. App. at 76a-77a).



decide. The government did not challenge on any basis an award of "fees for fees" in the district court. Indeed the district court used the government's waiver of this issue as the explicit basis for the award. (Pet. App. at 85a).

## REASONS FOR DENYING THE PETITION

It is inappropriate and unnecessary for this Court to review the issue of "fees for fees" in light of the procedural posture of this case and the status of the issue in the lower courts and in Congress.

1. The question raised by the government—the standard for granting "fees for fees" under the EAJA—is not clearly presented in the record, and indeed was waived below. As the district court found:

> None of the fees, costs, or expenses have been challenged by the government by way of motion, counter-affidavit or request for evidentiary hearing. As the government has voiced no objection to these fees, costs and expenses and based upon the Court's previous findings under *Johnson* and the other factors enumerated above, which it incorporates herein, the Court believes these requests are reasonable.

(Pet. App. at 85a). The waiver basis for the district court's decision on the "fees for fees" issue should thus preclude certiorari for a number of reasons.

a. If this Court granted certiorari to consider the question of the standard under which "fees for fees" should be awarded, the Court could well decide the case on the altogether separate ground of waiver and thus not reach the point on which certiorari was granted. In such circumstances, certiorari should be denied. *See The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation"); *see also* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 201 (6th ed. 1986) *citing Sanson*

*Hosiery Mills v. NLRB*, 344 U.S. 863 (1952), and *The Arlington, Inc. v. Mayer*, 339 U.S. 965 (1950).

b. If this Court granted certiorari and decided the question of the standard for an award of "fees for fees," on remand it would be open to the district court to adhere to its decision on the "fees for fees" granted based solely on waiver. Since resolution of the issue could therefore be irrelevant to the outcome of the case, a grant of the writ would be inappropriate. *See* R. Stern, E. Gressman & S. Shapiro, *supra* at 201-02 *citing Sommerville v. United States*, 376 U.S. 909 (1964). Moreover, the existence of an alternate procedural ground for decision fully independent of the substantive question framed by the Petition would render a decision on the substantive question an advisory opinion beyond this Court's Article III powers.

c. The fact that this case is already on remand to the district court provides an additional and compelling argument for denying certiorari at this time. The remand will afford an opportunity for clarification of the question of whether waiver alone will serve as the basis for an award of "fees for fees." If so, this case will provide no occasion to consider the question for which certiorari is sought; if not, it will be time then for this Court to decide whether the issue merits certiorari. Even where a remand is not necessary, this Court sometimes orders such a remand in order to obtain clarification that may render unnecessary decision of federal issues. *See, e.g., City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982). A fortiori, where remand is necessary anyway, such remand and the clarification it may bring should precede consideration of whether certiorari is necessary.

2. The conflict in the Circuits asserted by the government as the basis for granting certiorari, upon examination, is no conflict at all. The Petition cites as decisions in conflict with the decision below cases from the Fifth, Seventh, Eighth and Ninth Circuits.

a. The Fifth Circuit's view is pure dictum expressed in a footnote. *Russell v. National Mediation Bd.*, 775 F.2d 1284, 1291 n.8 (5th Cir. 1985).



b. The Seventh, Eighth and Ninth Circuit decisions cited in the Petition, (*Continental Web Press, Inc. v. NLRB*, 767 F.2d 321 (7th Cir. 1985); *Cornella v. Schweiker*, 741 F.2d 170 (8th Cir. 1984); *Rawlings v. Heckler*, 725 F.2d 1192 (9th Cir. 1984)), arose prior to the 1985 amendments to the EAJA. The significance of these amendments to the question raised here was described by the Second Circuit as follows:

> Severing separate parts of the litigation for purposes of determining the availability of counsel fees is inappropriate in view of this congressional mandate to look not at the government's litigation position, but rather at the underlying action that spawned the litigation, in the first place. Were the government's litigation position the sole criterion for the award of fees, it might be justified to look at different phases of the litigation separately to determine whether the litigation position in each phase was "substantially justified." But since the litigation position is no longer the relevant criterion, there is no reason to divide up phases of the litigation for examination. In short, if the underlying agency action was not substantially justified, the victim of that unjustified action is entitled to all reasonable attorney's fees, including those incurred on the fee application.

*Trichilo v. Secretary of Health & Human Servs.*, 823 F.2d 702, 708 (2d Cir. 1987)•

c. In the context of the facts here, there is no conflict between the decision in this case and anything decided by the Seventh, Eighth and Ninth Circuits. In this case, the govern-

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• Although two Circuits—the Eighth and Ninth—have adhered to their prior decisions in cases decided after the 1985 amendments, they did so without further analysis and without considering the impact of the 1985 amendments on the "fees for fees" issue. *See National Wildlife Fed'n v. Federal Energy Regulatory Comm'n*, 870 F.2d 542, 547-48 (9th Cir. 1989); *United States v. Estridge*, 797 F.2d 1454, 1459-60 (8th Cir. 1986). Since the only courts which have considered the impact of the 1985 amendments on "fees for fees" have adopted the *per se* rule, it may well be that "patience in the judicial resolution of conflicts may . . . produce the most desirable result." Justice Stevens, *Some Thoughts on Judicial Restraint*, 66 Judicature 177, 183 (1982).

ment failed to contest "fees for fees" in the district court, and therefore waived the issue. There is nothing in the latter cases indicating that in such a situation lack of substantial justification would have to be demonstrated as a condition for an award of "fees for fees."

3. The Eleventh Circuit's ruling on the issue of "fees for fees" is not only consistent with the prevailing view in the circuits, it is correct. This Court has admonished that a request for attorney's fees should "not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Petitioner's argument that a "*per se* rule" will protract litigation by encouraging parties to file unreasonable fee requests since "the government will have to bear all the costs of litigating them" (Pet. at 15) misstates the rule adopted by the court below, which held that "the United States may not oppose a 'fee for fees' request solely on the ground that its position in the fee litigation was substantially justified." (Pet. App. at 41a). The government remains free to challenge the reasonableness of such awards. As the court in *Trichilo* noted, "[i]f counsel makes inflated or outrageous fee demands, the court could readily deny compensation for time spent in pressing them, since that time would not have been 'reasonably spent.' " 823 F.2d at 708. That a far greater risk of meritless litigation is posed by the government's freedom to litigate infinitely the "substantial justification" issue is amply in evidence here. This case demonstrates the wisdom of the Eleventh Circuit's adoption of the view that "in most cases a loss on the generous 'substantially justified' EAJA threshold strongly indicates that the government is clinging to an unreasonable position." (Pet. App. at 38a-39a).

4. In any event, the merits of this rule may soon be resolved by the legislature. There is pending in Congress a bill entitled The Legal Fees Equity Act of 1989 which is intended to govern and clarify all federal fee-shifting statutes. In its present form, the legislation would resolve the issue of "fees for fees" by requiring that a party seeking fees show, among other things, that "the work for which the award of attorneys' fees and related expenses is sought . . . was performed . . . in connection with issues upon which the party prevailed against the



United States. . . ." S. 90, 101st Cong., 1st Sess. § 5(2) 135 Cong. Rec. S415 (daily ed. Jan. 25, 1989) (Resp. App. 6a). It would be an unnecessary and imprudent use of this Court's limited certiorari jurisdiction to review an issue that is presently under consideration by the legislature.

## CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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# APPENDIX

## S. 90

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That this Act may be cited as "The Legal Fees Equity Act of 1989".

SEC. 2. FINDINGS AND PURPOSES.

(A) Congress hereby finds and declares that—

(1) many Federal statutes authorize awards of attorneys' fees to be made to parties who prevail against the United States, or against State or local governments, in judicial and administrative proceedings;

(2) the failure to provide standards to guide courts and administrative bodies in awarding such fees has led to inconsistent interpretations of these Federal civil fee-shifting statutes, and in many instances to excessive awards of attorneys' fees under them;

(3) it is inappropriate for the Federal Government to impose on State and local governments the statutory requirement to pay awards of attorneys' fees without providing standards by which to make such awards;

(4) the limitation of $75 per hour prescribed by Congress for civil judicial and administrative proceedings under the Equal Access to Justice Act provides a reasonable and appropriate maximum hourly rate for the award of attorneys' fees against the United States, or against State or local governments, in judicial or administrative proceedings;

(5) it is inappropriate for awards of attorneys' fees to be made to parties who have prevailed on the merits of their complaint against the United States, or against State or local governments, in judicial or administrative proceedings;

(6) it is appropriate that parties in judicial or administrative proceedings against the United States, or against State or local

governments, pay a reasonable portion of their attorneys' fees when monetary awards are recovered;

(7) statutory provisions are necessary to control the circumstances and conditions under which awards of attorneys' fees and related expenses or costs may be made against the United States, or against State or local governments, in judicial or administrative proceedings; and

(8) statutory amendments are also appropriate to limit the circumstances in which Federal agencies hire outside private counsel from litigation and the amounts at which such outside counsel can be paid.

(b) It is the purpose of this Act—

(1) to establish a uniform hourly rate that shall be the maximum compensation authorized to be awarded against the United States, or against State or local governments, in judicial or administrative proceedings to which any Federal fee-shifting statute applies;

(2) to require that awards of attorneys fees against the United States, or against State or local governments, in judicial or administrative proceedings to which any Federal fee-shifting statute applies be made only to parties who have prevailed in the proceedings;

(3) to prescribe standards for the awarding of attorneys' fees and related expenses or costs against the United States, or against State or local governments, in judicial or administrative proceedings to which any Federal fee-shifting statute applies; and

(4) to authorize the Attorney General to promulgate regulations governing the circumstances in which Federal agencies can retain outside private counsel for litigation and to impose a uniform limit on the rates such counsel can be paid from appropriated funds.



SEC. 3. DEFINITIONS.

For the purpose of this Act—

(1) "attorneys' fees" means fees attributable to professional legal services performed by a person, or persons, licensed to practice law (but shall not include services by pro se claimants), or to services by enrolled tax practitioners with respect to proceedings before the United States Tax Court, including overhead expenses, as defined in this Act, but not including related expenses;

(2) "fee-shifting statute" means any Federal statute that provides for recovery by a party of attorneys' fees or related expenses against the United States, or against a State or local government;

(3) "overhead expenses", except in extraordinary circumstances, shall include, but not be limited to, rent or mortgage payments, maintenance (including heating and cooling costs), furniture and supplies, reporters, treatises, and other books, secretarial and other clerical and librarian time (including computer word processing expenses), telephone services and calls, and mailing expenses;

(4) "related expenses" means those expenses that may be awarded pursuant to a Federal law, and which are actually incurred by the attorney in connection with judicial or administrative proceedings, but does not include attorneys' fees or overhead expenses, as defined in this Act, or costs enumerated in section 1920 of title 28, United States Code;

(5) "party" means, for purposes of judicial proceedings, a party as defined by rule 17 of the Federal Rules of Civil Procedure, or, for purposes of administrative proceedings, a party as defined in section 551(3) of title 5, United States Code;

(6) "judicial proceeding" means a civil proceeding in any court or under the jurisdiction of a judicial officer, in which a party may by law be awarded attorneys' fees or related expenses;

(7) "administrative proceeding" means any proceeding, other than a judicial proceeding, in which a party may by law be awarded attorneys' fees or related expenses;

(8) "administrative officer" means the official(s) or person(s) authorized by statute or regulation to decide the substantive issues being considered in an administrative proceeding, or the official(s) or person(s) designated by the head of the agency as the administrative officer(s) for the purpose of this Act;

(9) "prevailed on the merits" means having obtained a final decision in which the party has succeeded on a significant issue or issues in the controversy and obtained significant relief in connection with that issue or issues, and may include, where the party is a defendant in a suit by the government, obtaining the dismissal of the complaint;

(10) "final decision" means a final judgment by the court, or a final order by an agency, in which a party establishes entitlement to relief on the merits of the claim or claims brought in the proceeding, and includes a judgment or order obtained by a party dismissing the proceeding with prejudice or pursuant to a settlement agreement;

(11) "United States" means the United States, or any agency of the United States, or any official of the United States acting in his or her official capacity;

(12) "State" means any State government, or any agency of the State government, or any official of the State government acting in his or her official capacity, and includes the territories and the District of Columbia; and

(13) "local government" means any county, city, town, municipality, municipal corporation, school board, special governmental district, or other political subdivision created by a State, or any agency of such entity, or any official of such entity acting in his or her official capacity.



SEC. 4. SCOPE AND APPLICATION; RELATIONSHIP TO OTHER LAWS.

(a) The provisions of this Act—

(1) apply to any judicial or administrative proceeding in which an award of attorneys' fees and related expenses is authorized, pursuant to any Federal fee-shifting statute, to be made against the United States, or a State or local government, and

(2) establish, minimum criteria and requirements for the award of attorneys' fees and related expenses to which this Act applies.

(b) Notwithstanding any other provision of law, no award of attorneys' fees or related expenses shall be made against the United States, or against State or local governments, in any judicial or administrative proceeding, except as expressly authorized by law (other than this Act), and in accordance with the provisions of this Act. No such award shall exceed the amount determined under the provisions of this Act.

(c) (1) The provisions of any applicable Federal fee-shifting statute that establish criteria or requirements in addition to those provided in this Act for the award of attorneys' fees and related expenses in such proceedings, or that otherwise limit awards of attorneys' fees in such proceedings, shall apply in addition to the provisions of this Act.

(2) Nothing in this Act shall be interpreted to create any right to, or provide any authority for, an award of attorneys' fees or related expenses in any judicial or administrative proceeding.

(d) No awards of attorneys' fees or related expenses shall be made under a Federal fee-shifting statute against a party who has intervened to defend the validity of a law or action of the United States, or a State or local government, and who has not been found to have violated a constitutional or statutory right of the party seeking the award.

(e) Awards of attorneys' fees and related expenses otherwise authorized under section 504 of title 5 of the United States Code or section 2412(d) of title 28 of the United States Code (the

Equal Access to Justice Act) shall be made in accordance with the provisions of this Act, except that subsections (a)(1), (b)(1)(C), (b)(2)(A), and (c) of section 6 of this Act shall not apply.

(f) The provisions of this Act shall not apply to compensation of attorneys in proceedings under section 3006A of title 18, United States Code.

SEC. 5. ALLOWANCE OF ATTORNEYS' FEES.

A party otherwise eligible to receive attorneys' fees and related expenses to which this Act applies must establish that—

(1) the party has prevailed on the merits against the United States, or against a State or local government;

(2) the work for which the award of attorneys' fees and related expenses is sought—

(A) was performed in the judicial or administrative proceeding in connection with issues upon which the party prevailed against the United States or against a State or local government, and

(B) was not excessive, redundant, or otherwise unnecessary to resolve the controversy; and

(3) the application for attorneys' fees and related expenses is made in accordance with sections 6(a) and 7 of this Act.

SEC. 6. AMOUNT OF ATTORNEYS' FEES.

(a)(1) No award of attorneys' fees against the United States, or against a State or local government, to which this Act applies shall exceed $75 per hour.

(2) Bonuses or multipliers shall not be used in calculating awards of attorneys' fees.

(b)(1) The Court or Administrative officer shall reduce or deny accordingly the amount of attorneys' fees and related expenses otherwise allowable if it is found that—



(A) The prevailing party, during the course of the proceeding, engaged in conduct that unreasonably protracted that final resolution of the controversy,

(B) the amount of attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly salary of the attorney representing the party, or

(C) the time spent and legal services provided were excessive with regard to the nature of the controversy.

(2) The court or administrative officer, in the exercise of discretion, may reduce or deny an award where—

(A) the amount of attorneys' fees otherwise authorized to be awarded unreasonably exceeds the monetary result or value of injunctive relief achieved in the proceeding, or

(B) a reduction or denial of the amount of attorneys' fees would otherwise be appropriate under the applicable fee-shifting statute.

(c) Whenever a monetary judgment is awarded in any judicial or administrative proceeding to which a Federal fee-shifting statute applies, a portion of the judgment (but not more than 25 per centum thereof) shall be applied to satisfy the amount of attorneys' fees authorized to be awarded against the United States, or against a State or local Government. If the authorized award of attorneys' fees exceeds 25 per centum of the judgment, the excess shall be paid by the United States, or the State or local government. This subsection shall not apply to awards of attorneys' fees pursuant to section 7430 of the Internal Revenue Code.

(d) Section 593(g) of title 28, United States Code, relating to independent counsel investigations, is amended by adding at the end thereof the following new sentence: "Such award shall not exceed $75 per hour.".

SEC. 7. TIMELY APPLICATIONS AND PROCEDURES

(a) In any judicial or administrative proceeding to which this Act applies, a party may seek an award of attorneys' fees and

related expenses only within thirty days after a final decision by the court or agency from which no appeal is taken. The party seeking an award of attorneys' fees shall submit to the court or agency such information as may be required by the court or agency.

(b) Courts and agencies shall develop procedures, not inconsistent with this Act, for filing of applications for awards of attorneys' fees, which shall provide guidance as to what information should be required to be submitted pursuant to subsection (a) of this section, when such information should be submitted, and when determinations should be made concerning awards of attorneys' fees and related expenses. In no event shall an award of attorneys' fees and related expenses be made prior to entry of a final decision by the court or agency.

SEC. 8. MOOTNESS AND SETTLEMENT DEFENSES.

No award of attorneys' fees and related expenses subject to the provisions of this Act may be made—

(1) where the Government demonstrates that—

(A) the claims have become moot due to a change in Government policy, and

(B) the pendency of the judicial or administrative proceeding was not a material factor in such change in policy; or

(2) for services performed subsequent to the time a written offer of settlement is made to a party, if the offer is not accepted and a court or administrative officer finds that the relief finally obtained by the party is not more favorable to the party than the offer of settlement.

SEC. 9. COMPTROLLER GENERAL REPORT.

The Comptroller General of the United States shall submit on April 1 of each year a report to the President and the Congress on the amount of attorneys' fees and related expenses awarded during the preceding fiscal year against the United States, or against State or local governments, in judicial and administrative proceedings to which this Act applies. The courts and each



agency shall provide the Comptroller General with such information as is necessary to comply with the requirements of this section.

SEC. 10. LIMITATION ON EMPLOYMENT AND COMPENSATION OF OUTSIDE, PRIVATE COUNSEL.

Section 3106 of title 5, United States Code, is amended to read as follows:

"§ 3106 Employment of attorneys; restrictions

"(a) Except as otherwise authorized by law, the head of an executive department, military department, or other agency, including an independent agency, board, or commission may not employ an attorney or counsel for the conduct of litigation in which the United States, an agency, or employee thereof is a party, or is interested, or for the securing of evidence therefor, but shall refer the matter to the Department of Justice.

"(b) Notwithstanding any other provision of law—

"(1) an executive department, military department, or other agency, including an independent agency, board, or commission, shall not retain outside, private counsel for the conduct of judicial or administrative litigation in which the United States, an agency, or employee thereof is a party, or is interested, or for the securing of evidence therefor, except upon a certification of need by the Attorney General and in accordance with regulations promulgated by the Attorney General; and

"(2) no payment from appropriated funds to such outside, private counsel retained pursuant to subsection (b)(1) shall exceed $75 an hour.

"(c) The Attorney General, after consultation with the Office of Management and Budget, the Office of Personnel Management, and other interested agencies, and upon public notice and comment pursuant to section 553 of this title, shall promulgate regulations implementing this section, including—

"(1) the circumstances, terms, and conditions under which executive departments, military departments, and other agen-

cies, including independent agencies, boards, and commissions, are authorized to employ outside, private counsel to be paid from appropriated funds;

"(2) procedures for the receipt and prompt resolution of applications from any agency for a certification of need by the Attorney General, in a particular case or class of cases, authorizing the retention of outside, private counsel for litigation in circumstances not otherwise permitted under this section; and

"(3) the coordination of the use and availability of the expertise of attorneys within the executive branch of Government for litigation.

The regulations authorized by this subsection and the determinations of the Attorney General pursuant to such regulations shall not be subject to judicial review.

"(d) for the purposes of this section, the term 'outside, private counsel' means an attorney, firm, legal services organization, or association engaged in the practice of law other than as an employee of the United States.

"(e) This section does not apply to the employment and payment of counsel under section 1037 of title 10.".

SEC. 11. EFFECTIVE DATE.

The provisions of this Act shall apply to any award of attorneys' fees and related expenses incurred subsequent to the enactment of this Act, including those incurred after such date in actions commenced prior to such enactment.